No. 3815.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN LARSEN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

HENRY RODEN,
Attorney for Defendant in Error.

THE RECORDER COMPANY, 659 STEVENSON ST., S. F.

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ARGUMENT.

The sole point raised by plaintiff in error in its brief is stated by it as follows: *"There was no evidence of injury or damage upon which the jury could base a verdict for damages."*

The plaintiff in error admits (Printed Tr, p. 33) that "testimony was presented sufficient to sustain the verdict of the jury upon all matters submitted to them" save and except as to the amount of the damages sustained.

The question of the negligence of plaintiff in error is therefore fully settled, leaving for the consideration of this Court only the question as to whether or not there was testimony showing the extent of the injuries and the amount of damage done to the personal property of defendant in error by the negligence of plain-

tiff in error. As to the extent of the injuries, plaintiff in error, in its brief (p. 8) admits that the total destruction of the personal property is, at least, shown by inference drawn from competent testimony submitted upon the trial. The logical inference, drawn from competent evidence is as much competent legal proof of the fact inferred as though such fact were established by direct and positive evidence.

> "When a material fact is not proved by direct testimony, it may be rationally inferred by the court or jury from the facts which have been so proved, even though the inference be not a necessary one. But an inference should not be adopted from a few of the facts proved, when it is absolutely inconsistent with, and repelled by, other equally well proved facts."
>
> 17 Cyc. 820.

> "Appropriate inferences from proved facts are not a low order of evidence sufficient even to overcome positive and direct testimony. Whether they should be permitted to overcome positive and direct testimony or not depends, in every instance, upon the relative strength of the one or the other."
>
> *Womack* vs. *Horseley,* 152 N. W. 65.

If opposing counsel are forced to admit, as they do in their brief, page 8, that the total destruction of the personal property may be ascertained by inference from competent testimony submitted, it may fairly be asked why the jury would not be justified in drawing the same conclusion that seems to force itself upon the attention of counsel. They use this language in their brief (p. 8):

> "There was no *direct evidence* that any of the personal property was either injured or destroyed, unless this may be inferred from the fact that the house in which these articles were contained was destroyed by the slide. Even if it should be said that this were some evidence," etc.

Evidently they admit that it is "some evidence". The defendant in error testified that at the time of the slide he was in his house containing the personal property destroyed; that the house was carried down the hillside, which as alleged in the complaint and testified to in the course of the trial, was located on a hillside having a slope of 40 degrees from the horizontal; that this house was carried some fifty feet through and below a trestle work (Pr. Tr., p. 52), and when defendant in error found himself, his house had become "a pile of lumber on top of him."

In addition to this testimony, a bill of particulars, setting forth the items destroyed and their value, was introduced in evidence without any objection on the part of plaintiff in error. Upon this point the record reads (pp. 58 and 59):

> "Mr. Roden: I would like to offer in evidence the bill of particulars that was filed, setting forth the property that was in the house.
> "The Court: It will be received."

There is no objection on the part of plaintiff in error to its introduction.

Before this, when defendant in error began to enumerate the property in the house, and desired to use a list thereof to aid him, the following took place, as shown by the record (p. 44):

"Q. Have you a list of the stuff you had in the house? A. Yes.

"Q. You may use that list and tell us what was in there.

"The Court: If he has a list of it, just submit the list.

"Q. Have you a list there? A. Yes.

"The Court: Fix the valuation so the whole thing may go in." (Tr., p. 45.)

When the bill of particulars was then offered plaintiff in error stated:

"Mr. Hellenthal: It goes in evidence only to the extent of being an enumeration of the property. *The list also contains the valuation of each article—we do not object to that.*"

There was no objection of any kind when the bill of particulars was finally admitted in evidence as shown by the record (pp. 58 and 59).

This bill of particulars sets forth that it is

"a bill of particular items of personal property claimed by plaintiff in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant."

When this bill was admitted in evidence, without complaint or objection, we submit it became as much a part of the testimony and evidence in this cause as any other evidence admitted upon the trial, subject to cross-examination and attack by plaintiff in error and, if believed, decisive of the issue under consideration.

Plaintiff in error did not care to cross-examine upon this point and did not submit any evidence to contradict the evidence adduced.

Counsel for plaintiff in error complain about the evidence in support of the amount of damages sustained.

After it had been shown that the personal property was destroyed plaintiff below testified, after the trial court instructed him (to fix the valuation so the whole thing may go in), as to the total worth and value of the property. And this occurred after opposing counsel had stated:

> "The list contains the valuation of each article —we do not object to that, of course (to its being admitted in evidence)."

The plaintiff in error, having no objection or complaint to urge against the evidence showing the worth and value of the destroyed property, cannot now be heard to complain. The worth and value, in the absence of any special showing, must have been that value to the recovery of which defendant in error was entitled under the law.

An examination of the record discloses that defendant in error was prepared and commenced to testify concerning the value of each article when the trial court suggested to put in the total amount and counsel expressly admitted that they had no objection thereto. Had plaintiff in error been dissatisfied with the value it might have cross-examined the witness with perfect propriety and elicited from him whatever further information it might have desired upon the value or worth of the destroyed property, its condition at the time of its destruction and such other information as it might have desired upon this question.

Says the Supreme Court of Missouri in *Seyfarth* vs. *Railway Co.*, 52 Mo. 450, involving the testimony of husband and wife as to the value of goods of a kindred character as in the case at bar:

> "the subject of inquiry was not one to which the doctrine in reference to experts applied; and it cannot be questioned that the opinion of this witness as to the value of the articles was clearly admissible under the circumstances. The plaintiff was not obliged to restrict the examination to the value of each article, and in that way arrive at the total value; nor was it incumbent on him to show the process by which the conclusion of the witness was reached."
>
> "We think it was competent for the witness (the owner of the goods) to state the value of the stock in the store. Such evidence was not the statement of a conclusion, but of a fact. If the defendant desired, he could, on cross-examination, have interrogated the witness as to the value of the different articles and kind of goods."
>
> *Western Home Insurance Co.* vs. *Richardson*, 58 N. W. 600.

To the same effect are the following:

Erickson vs. *Drazkowski*, 54 N. W. 283, (Mich.);
Tubbs vs. *Garrison*, 25 N. W. 923 (Iowa);
Railway Co. vs. *Miller*, 162 S. W. 76;
P. & N. T. Ry. Co. vs. *Porter*, 156 S. W. 267;
Fairfax vs. *Railway*, 73 N. Y. 167, 29 Am. Rep. 119.

> "The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony may be left to the jury;

and courts have usually made no objections to this policy."

Wigmore, vol. 1, par. 716.

In the case of *Pecos & N. T. Ry. Co.*, 171 S. W. 318, one of the owners of a part of the property testified as to the worth and value of a part of the personal property consisting of clothing, culinary articles, household paraphernalia, etc., stating the same item by item. Defendant objected to the witness, "stating what said items were worth, because this was not the proper method of proving the value of said articles, or the proper measure of damages for the loss thereof."

Says the Court, after quoting numerous authorities:

> "We are unable to find any well considered case, as to the peculiar property involved here, that the owner of the goods, as a witness, is required to state the elements mentioned (cost of articles, period of their use and their condition at time of destruction) as a precedent qualification to testify to their value. The defendant produced no witness testifying to the value of the property lost; neither does the record show any cross-examination by defendants of the witnesses attempting to ascertain the cost of said articles, the extent of their use, the kind and character of the same, or as to the condition of the goods at any time, but rely solely upon the general objection. If the value in this instance is at all fanciful, or if the ingredients of cost, the extent of the use of the property, the condition of same at the time of their loss would have indicated to the jury that the value placed upon the same was improper, we believe, in this character of case, it is the duty of defendant to elicit it."

We respectfully submit that the authorities cited by plaintiff in error do not support its contention. Counsel quote at length from the decision in

Watson et al. vs. *Loughram,* 38 S. E. 82.

An examination this case discloses that counsel fail to quote the important part of the decision. The case was reversed upon an erroneous instruction concerning the measure of damages. We quote from the decision:

> "The only evidence as to the value of some of the jewels was the price at which they had been purchased and some of the most valuable of them had been purchased many years prior to the loss. In arriving at their verdict the jury was clearly controlled by the price paid and not by their market value at the time when the loss occurred, and although the evidence of the plaintiff showed that the market value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, the jury evidently estimated them at their purchase price. (Verdict being for the exact amount set up in the petition.) In view of this, it was error to charge the jury as follows:
>
> " 'This is a question of the value of property, and you are to be governed by the value of that property as produced upon the stand; whether right or wrong is no concern of yours—you find your verdict according to what is proven to be the value of the property.' "

Upon this instruction the Appellate Court remarks:

> "As we have seen with reference to some of the jewels lost the only value produced upon the stand was the valuation put upon them by the buyer and seller at the time of their purchase, and the jury, from the charge that they were 'to

> be governed by the value of that property as produced upon the stand' which, 'whether right or wrong, was no concern of theirs' might have understood that they were compelled to find the value of these jewels in accordance with that valuation."

A very different situation from the case at bar, where the Court instructed correctly upon the measure of damages and to the satisfaction of plaintiff in error. The opinion continues:

> "As the defendants are clearly and justly liable to plaintiff for the market value of the property at the time of their loss, and the sole ground upon which a new trial is granted is that the evidence as to this market value is not sufficient to support the verdict rendered by the jury, a new trial is ordered upon this question alone, and that when the jury shall have found the market value of the property at the time of their loss, to which the jury may, if they see fit, add interest to the date of their finding, a judgment shall be entered for the plaintiff and against the defendant for the amount so found."

Counsel quote from

> *Carmen* vs. *Montana Cent. Ry. Co.*, 79 Pac. 690.

From the quotation of plaintiff in error one might conclude that the case was reversed on account of lack of evidence to support the finding as to the amount of damages. Such is not the case. The Appellate Court found no evidence to sustain the allegations of the complaint as to the negligent conduct of the defendant railway company, on account of which the cattle

were claimed to have been killed and injured. As to the testimony to support the amount of damage done, it clearly appears that the value of the killed animals and the value of the injured ones were lumped in the sum of $240.00. The evidence is:

> "Q. What would you place the value of those animals—taking all those that were *injured or killed,* what would you place the damage at—the value?
>
> "A. I would not have sold them for near the amount of money I put them in for.
>
> "Q. Tell the jury what they were worth (the killed and injured animals).
>
> "A. They were worth to me more than they would be to most anyone—I put them in for $250.00."

We find no fault with the Court when it says:

> "The damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages, for the cattle injured, could not be fixed by the same rule."

Certainly the value of the injured cattle was not the amount of damages sustained by plaintiff in that case.

In *Schwartz* vs. *Schendel,* 53 N. Y. S. 829, the only evidence introduced was to the effect that some damage had been done to certain goods by water overflowing and that the value of the goods damaged, at a rough estimate, was $200.00. There was no testimony as to the nature and quantity of the goods nor as to the extent of the injuries thereto.

The remaining authorities quoted by plaintiff in error do not sustain its contention. An examination of these cases shows that the evidence of damages, given in them, was simply a statement as to the original cost of the damaged article, and not as to its value at the time the injuries were sustained. For instance:

In *Connolly* vs. *Interurban St. Ry.,* 86 N. Y. S. 213, the plaintiff testified that his damage to his clothing amounted to fifty dollars, because he paid fifty dollars for the clothes. There was no testimony as to its value at the time the damage was inflicted.

In *Glass* vs. *Hauser,* 78 N. Y. S. 830, the Court says:

> "In one breath plaintiff testified to $380.24, in the next to $365.05, and in the next to $363.05 as to the value of the property, upon which the justice gave a judgment in the sum of $263.05."

In *Lee* vs. *Callahan,* 84 N. Y. S. 167, the plaintiff stated what he paid for the injured horse a year and a half before the accident, and that he did not know its market value.

In *Whitmark* vs. *Lorton,* 8 N. Y. S. 167, plaintiff testified what he had paid or agreed to pay for the property converted, and the court held that this testimony furnished no basis for the amount of damage he might be entitled to.

In *Brooks* vs. *Cunard S. S. Co.,* an action brought for the loss of baggage, the testimony of plaintiff was that he based his opinion of the value of the goods lost on their cost price, unaccompanied by further

testimony as to their cost price, except in the case of a very few articles.

In *McGillivray* vs. *Hampton,* 179 Pac. 733, quoted by counsel for plaintiff in error, the Court says:

> "As to the finding of the Court that the hay destroyed had a market value of $8.00 per ton, we have searched the record in vain to find evidence to support it. None of the testimony placed the value of baled hay at a greater sum than $8.00 for baled hay; the cost of baling was proved to be $1.75 per ton. The price of $8.00 per ton for unbaled hay as fixed by the trial judge is not supported by a word of evidence."

In *Johnson* vs. *Levy,* 86 Pac. 810, the Court says:

> "The examination of the plaintiff, both upon direct and cross, demonstrates that he had no personal knowledge upon which to base an estimate (for the damages sustained for the wrongful withholding of the possession of real estate). But even if this evidence be accorded the utmost weight, it is still insufficient. It clearly indicates that the estimated damages consisted of profits which might have accrued from the business which plaintiff might have conducted. Under no rule of law known to us can damages for the withholding of real property include speculative damages."

The last cast cited by plaintiff in error is *Hays* vs. *Windsor,* 62 Pac. 395, this being an action for replevin. Upon the question of damages, and upon which plaintiff in error seems to rely, the syllabus reads:

"Evidence that defendant, in an action of replevin, had lost much time and had been deprived of the replevied goods, and had been delayed in the payment of his debts, is not sufficient to show the damage resulting from the wrongful suing out of the writ."

We respectfully submit that the verdict and judgment of the lower court should be sustained.

Respectfully submitted,

HENRY RODEN,

Attorney for Defendant in Error.

ADDITIONAL AUTHORITIES.

Inventory.

"The inventory was offered and received in evidence. Witness testified that he made it with the cost price of each item which he said was the true value thereof. Held proper."

Chicago & E. R. Co. vs. *Ohio City L. Co.,* 214 Fed. 751 (8th Circt).

Market Value.

Unless some other basis of value is fixed by the witness it will be presumed that the estimate is based upon the market value at the time the estimate is made.

"The witness testified that the horses were of such and such a value. We think this fairly implies the market value at the time. The witness fixed no other basis of knowledge and when one speaks generally of the value of chattels it means their value in the market. This is inferred unless a different basis of value is fixed by the witness."

Coyle vs. *Brown,* 41 Pac. 389.